

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DESMOND JONES,

Plaintiff,

v.

JOSPEH BICK, et al.,

Defendants.

No. 2:21-cv-1603-TLN-EFB P

ORDER

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis in an action brought under 42 U.S.C. § 1983. Following the dismissal of his first amended complaint on screening¹ (ECF Nos. 8 & 9), plaintiff has filed a second amended complaint (ECF No. 12), which the court must now screen. As discussed below, plaintiff's second amended complaint is dismissed with leave to amend for failure to state a claim.

Plaintiff alleges that he suffers from hyperthyroidism, which causes weight loss. He claims that his condition is managed by Ensure, a liquid nutritional supplement and a medication called methimazole, which reduces his white blood cell count and compromises his immunity.

¹ Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b).

1 He claims that defendants Tyler Campbell, his primary care physician, and LaDon Silva, a
2 California Department of Corrections and Rehabilitation dietician, were deliberately indifferent to
3 his serious medical needs in the following ways: (1) by discontinuing his order of Ensure,
4 resulting in him dropping from 154 pounds in August 2020 to 134 pounds in August 2021 (ECF
5 No. 12 at 7); and (2) by failing to monitor plaintiff's white blood cell count while symptomatic
6 with COVID-19 from December 28, 2020 through January 11, 2021. Relying upon these
7 allegations, plaintiff asserts Eighth Amendment deliberate indifference to medical needs claims
8 against defendants Campbell and Silva. As discussed below, these claims cannot survive
9 screening.

10 To succeed on an Eighth Amendment claim predicated on allegedly deficient medical
11 care, a plaintiff must establish that: (1) he had a serious medical need and (2) the defendant's
12 response to that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
13 2006); *see also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To act with deliberate indifference, a
14 prison official must both be aware of facts from which the inference could be drawn that a
15 substantial risk of serious harm exists, and he must also draw the inference. *Farmer v. Brennan*,
16 511 U.S. 825, 837 (1994).

17 Plaintiff has identified serious medical needs but has not alleged facts showing that either
18 defendant responded to any of those needs with deliberate indifference. As for the Ensure,
19 plaintiff alleges that Campbell discontinued it because his hands were "tied" by the orders of
20 Silva. ECF No. 12 at 7. The reason for Silva's denial is her allegedly false belief that plaintiff
21 was choosing not to eat because he preferred Ensure. *Id.* These allegations, without further
22 elaboration, fail to demonstrate that either defendant discontinued Ensure with deliberate
23 indifference to plaintiff's medical needs. As for the failure to monitor plaintiff's white blood cell
24 count, he again fails to allege that this omission was with deliberate indifference. Nor does he
25 allege to have suffered any injury as a result. To the extent plaintiff attributes his COVID-19
26 infection to the acts or omissions of either defendant, it is far too attenuated and speculative.
27 Plaintiff has not alleged facts, which if true, show that either defendant caused or intended to
28 cause him to contract the virus.

1 For these reasons, plaintiff's second amended complaint is dismissed with leave to amend.
2 In a third amended complaint, should plaintiff choose to file one, he must allege specific facts
3 showing that defendants discontinued Ensure or failed to monitor his white blood cell count
4 knowing that it would expose plaintiff to a substantial risk of serious harm. Any amended
5 complaint should also observe the following:

6 Any amended complaint must identify as a defendant only persons who personally
7 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
8 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
9 constitutional right if he does an act, participates in another's act or omits to perform an act he is
10 legally required to do that causes the alleged deprivation). The complaint should also describe,
11 in sufficient detail, how each defendant personally violated or participated in the violation of his
12 rights. The court will not infer the existence of allegations that have not been explicitly set forth
13 in the amended complaint.

14 The amended complaint must contain a caption including the names of all defendants.
15 Fed. R. Civ. P. 10(a).

16 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. See
17 *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

18 Any amended complaint must be written or typed so that it so that it is complete in itself
19 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
20 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
21 earlier filed complaint no longer serves any function in the case. See *Forsyth v. Humana*, 114
22 F.3d 1467, 1474 (9th Cir. 1997) (the "'amended complaint supersedes the original, the latter
23 being treated thereafter as non-existent.'" (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
24 1967)).


25 Finally, the court notes that any amended complaint should be as concise as possible in
26 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of
27 procedural or factual background which has no bearing on his legal claims.

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1 Accordingly, IT IS ORDERED that:

- 2 1. Plaintiff's second amended complaint (ECF No. 12) is dismissed with leave to
3 amend within 30 days from the date of service of this order; and
4 2. Failure to comply with this order may result in dismissal of this action for the
5 reasons stated herein.

6 Dated: February 28, 2022.

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8 EDMUND F. BRENNAN
9 UNITED STATES MAGISTRATE JUDGE
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